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NOTE AND COMMENT.

INTERSTATE COMMERCE AND STATE CONTROL OVER FOREIGN CORPORATIONS.—Since *Bank of Augusta* v. *Earle,* 13 Pet. 519, there seems to have been no real occasion to doubt the power of a state totally to exclude foreign corporations seeking to engage in intrastate business only. The power to exclude being absolute, there has been no question as to the right of the state to allow the entrance of the foreign corporation for such business upon terms, and the terms may be of any sort, reasonable or unreasonable, except that the corporation seeking to enter cannot as a condition precedent to such entry be required to surrender a right or privilege conferred upon it by the federal constitution or statutes. For example, a condition that no case should be removed by the corporation to the federal courts was declared invalid, and the corporation was allowed to remove cases despite the condition. *Home Ins. Co.* v. *Morse,* 20 Wall. 445. But for breach of such condition a state was allowed to revoke the permit to engage in domestic business within its borders. *Doyle* v. *Insurance Co.,* 94 U. S. 535; *Security Mut. L. I. Co.* v. *Prewitt,* 202 U. S. 246. The terms of admission very often are in

the nature of requirements for the payment of a license fee, an excise for the privilege of engaging in business within the state, and such license fees may be of any amount, and measured by any standard, the questions of reasonableness and discrimination not being involved. *New York Life Ins. Co.* v. *McMaster,* 84 S. C. 495, 66 S. E. 877.

It must be considered as equally well settled that a state cannot refuse to allow a foreign corporation engaged in interstate commerce to come within its borders, nor may it impose terms or conditions upon such corporations. *International Text-Book Co.* v. *Pigg,* 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 24 L. R. A. (N. S.) 493.

Where a corporation seeks to enter a state for the purpose of doing both interstate and intrastate business the situation becomes somewhat more complex. Until a comparatively recent time it has been considered that the fact that a foreign corporation was to engage in interstate commerce along with its intrastate business did not prevent the state from imposing terms upon the right to engage in the latter or even to prohibit the same entirely; in other words, that there was no absolute right in a foreign corporation to engage in domestic business even though at the same time it was engaged, perhaps with the same instrumentalities, in carrying on interstate commerce. *Western Union Tel. Co.* v. *Alabama,* 132 U. S. 472; *Postal Tel. Cable Co. v. Charleston,* 153 U. S. 692; *Pullman Co.* v. *Adams,* 189 U. S. 420; *Allen* v. *Pullman Pal. Car Co.,* 191 U. S. 171; *Kehrer* v. *Stewart,* 197 U. S. 60. These cases clearly establish the proposition that foreign corporations engaged in interstate commerce may be taxed in respect of their privilege of carrying on domestic or intrastate business, and the power to lay such tax would, it seems, carry with it the power to prohibit.

In *Western Union Tel. Co.* v. *Kansas,* 216 U. S. 1, 30 Sup. Ct. 199, 54 L. Ed. 355, and *Pullman Co.* v. *Kansas,* 216 U. S. 56, 30 Sup. Ct. 232, 54 L. Ed. 378, the court had under consideration a Kansas statute which required a foreign corporation to pay a fee of one-tenth of one per cent on the first one hundred thousand dollars of its authorized capital stock, one twentieth of one per cent on the next four hundred thousand dollars, and for each million or major part thereof, two hundred dollars. The court declared the statute unconstitutional as violative of the fourteenth amendment and as burdening interstate commerce, the fee being considered as a tax upon the interstate business as well as the domestic business. Mr. Justic HARLAN in the *Western Union Case* said: "It is true that in many cases the general rule has been laid down that a State may, if it chooses to do so, exclude foreign corporations from its limits, or impose such terms and conditions on their doing business in the State as in its judgment may be consistent with the interests of the people. But those were cases in which the foreign corporation before the court was engaged in ordinary business and not directly or regularly in interstate or foreign commerce." The cases hereinbefore referred to declared that a foreign corporation engaged primarily in interstate commerce could be subjected to a tax upon the privilege of doing domestic business, and the result of the Kansas cases would seem to be that while not denying entirely the right of the state to lay such privilege tax, in the case of corporations

engaged directly or regularly in interstate commerce the tax must not be of such character as to burden even indirectly the company's interstate business. In those cases the tax measured as the statute directed was deemed to be a burden upon interstate commerce. See also to the same effect, *Ludwig* v. *Western Union Tel. Co.*, 216 U. S. 146; *Atchison, etc. R. Co.* v. *O'Connor*, 223 U. S. 280.

Two years after the decision of the Kansas cases the supreme court of California had occasion to pass upon the validity of a provision of the law of that state requiring foreign corporations to pay a "license tax" graduated in amount and measured by the total capital stock of the corporation. The provision was very much like the Kansas statute involved in the Kansas litigation. In the California case the validity of the law was attacked by a corporation organized in Pennsylvania and engaged in the business of manufacturing and selling tablets, pills, etc., some of its business being interstate and some intrastate. It was held, on the authority of the Kansas cases, that the tax was unconstitutional. *H. K. Mulford Co.* v. *Curry*, 163 Cal. 276, 125 Pac. 236. The principle of the Kansas cases was declared to be as follows: "The admitted power of the state to regulate and prescribe terms under which a foreign corporation may engage in intrastate or domestic business is subject to this limitation, that where such foreign corporation is engaged in interstate, as well as intrastate business, no such term, condition or requirement will be constitutional if it imposes any burden upon the interstate business of such corporation, whatever be its name or form. A license or privilege tax, for the conduct of such intrastate business, based upon the total capital or the total capital stock of such corporation, without just relation to the proportion which the capital or capital stock used in the state bears to the whole capital or capital stock, though in terms declared to be directed solely to the intrastate business of such corporation, is unconstitutional and void, (a) as being in violation of the commerce clause of the constitution by the imposition of an illegal burden upon interstate commerce, and (b) because violative of the fourteenth amendment of the constitution and its equal protection and due process of law clause, as an effort to tax the property of citizens of the United States, which property is situated beyond the jurisdiction of the taxing state and is not amenable to its revenue laws." Admittedly for the guidance of the legislature the court then proceeds to state its opinion as to the effect of the Kansas cases, and concludes: "It is but the indulgence of futile and unwarranted speculation to say that the Supreme Court of the United States would call in the fourteenth amendment to the aid of a foreign corporation doing an interstate business to overthrow a state tax law and would not invoke it in the case of a foreign corporation engaged in purely domestic business, notwithstanding that the tax upon the capital stocks of the foreign corporations (and thus the tax upon the property without the jurisdiction of the state) was in both instances identically the same. Nor can relief be found in a refusal to call such a license-fee a tax. A state court may call it a fee or an exaction or a regulation, but the Supreme Court of the United States will call it a tax if in its effect it partake of the nature of a tax."

That the California court was wrong in the statement last quoted and in its conclusion in the case before it is shown by the very recent cases of *Baltic Mining Co.* v. *Massachusetts* and *S. S. White Dental Mfg. Co.* v. *Massachusetts,* reported together with one opinion in 34 Sup. Ct. 15. In those cases the court considered the validity of a provision of the Massachusetts statutes providing that "Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver-general, for the use of the commonwealth, an excise tax, of one-fiftieth of one per cent of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of $2,000." The complaining corporations were organized in Michigan and Pennsylvania, and were engaged, the one in the business of mining and disposing of copper, and the other in the manufacture and sale of dental supplies; both had offices in Boston, and sold their products for delivery in Massachusetts and also outside the state, but only a relatively small portion of their property was in that state. It was held that the statute was valid; the Kansas cases were distinguished on the ground that in the present cases the "local and domestic business, for the privilege of doing which the state has imposed a tax, is real and substantial, and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved," that the capital stock was used simply as a means of measuring the license fee; while in the earlier cases the business of the complaining companies "was commerce, the same instrumentalities and the same agencies carrying on in the same places the business of the companies of state and interstate character," there being "no attempt to separate the intrastate business from the interstate business by the limitations of state lines in its prosecution," and the real nature of the tax, under the facts, was to burden interstate commerce and to reach property represented by the capital stock of the companies, which was duly paid in and invested in property in many states, and therefore beyond the taxing jurisdiction of Kansas.

In two cases decided within the last year the Supreme Court of the United States has declared that despite the Kansas cases it is within state power to exact a license fee of a foreign corporation for the privilege of engaging in domestic business, and in both of those cases the complaining companies were engaged primarily in interstate commerce and were organized for the purpose of carrying on commerce. *Williams* v. *Talladega,* 226 U. S. 404, 33 Sup. Ct. 118; *Ewing* v. *Leavenworth,* 226 U. S. 464, 33 Sup. Ct. 157. In the *Williams* case it was really the Western Union Telegraph Company that complained of a conviction of its agent Williams for having carried on domestic telegraph business in Alabama without having paid a license fee imposed by an ordinance of the City of Talladega. It appeared from the evidence that the domestic business of the company at Talladega for eleven months of the year 1908, the last quarter's license of which Williams had refused to pay, was conducted at a net loss of eighty-six cents. The following language of the Supreme Court is deeply significant: "It is contended that the result of the tax upon the intrastate business conducted at a loss is to

impose a burden upon the other business of the company and is therefore void. The Supreme Court of Alabama, however, reached the conclusion that the attempted test for eleven months, showing a loss of eighty-six cents, is not a sufficiently accurate representation of the business of the company conducted at Talladega to render the tax void. With this view we agree, and we are not satisfied that the tax is such as to impose a burden upon interstate commerce, and therefore make it subject to attack as a denial of Federal right."

A careful examination of the cases seems to establish that the law as to the matter herein considered has undergone a process of development and definition. From the cases decided prior to the Kansas cases the conclusion was inevitable that a state had the power to tax a foreign corporation for the privilege of engaging in domestic business, even though such corporation was at the same time engaged in interstate commerce and even though the business of the corporation was in a strict sense commerce, and that the power to tax such privilege, carried to its logical extent, meant also the power to prohibit such business. The corporation had its choice, either to pay the tax and abide by the terms and conditions imposed—subject to the limitations before pointed out, or to give up its domestic business. The Kansas cases declared that if the tax upon the privilege of doing intrastate business is measured by the total capital stock of the corporation and the corporation is one engaged directly and wholly in commerce, i. e. transportation, then the tax is in reality a burden upon interstate commerce and void as such. In the Massachusetts cases, however, the court now holds that a tax upon the privilege of doing domestic business measured on the basis of a percentage of the entire capital stock of a foreign corporation engaged in both interstate and domestic business, but which is not engaged in transportation itself, is a valid tax. It is believed that there is no sound distinction between the two groups of cases on the ground suggested. Interstate commerce which is protected by the federal constitution from state interference is not limited to transportation. The interstate business of a corporation engaged in manufacturing and selling its products should be as much protected from state interference and annoyance as the interstate business of a corporation engaged in transportation. The reason for guarding interstate commerce from state control is believed to be found not in any desire to extend any special indulgence to the *persons* engaged in such business, but for the protection of the *interstate business*. There may be a difference between the interstate business that is transportation and the interstate business that is not transportation in that state interference may be more immediately and directly felt by the public when the state action affects corporations engaged in the first, but it cannot be contended that the difference is other than of degree. It is submitted that the court's ground of distinction between the two groups of cases is not legally sound, that if the Kansas cases were correctly decided the Massachusetts cases are incorrect, or *vice-versa*. It is perhaps too late to protest against the conclusion in the Kansas cases, the court though divided five to four at the time the *Western Union* case was decided has since unanimously applied the rule of the case in later litigation involving the same

question. See *Atchison, etc. R. C.* v. *O'Connor,* supra. It is believed that the decision in those cases was erroneous, and that the correct doctrine is that laid down in the Massachusetts cases. However, the court has committed itself to the recognition of the two classes of cases.

The cases of *Williams* v. *Talladega* and *Ewing* v. *Leavenworth,* above referred to, show clearly that the court does not consider the Kansas cases as denying to the states the right to exact a tax upon the privilege of doing intrastate business even in the case of a corporation engaged primarily in interstate commerce in the way of transportation. Such tax, however, must be of such a character and of such an amount as not to be a burden upon the corporation's interstate commerce, and the intimation is strong in *Williams* v. *Talladega* that it is proper and important to inquire into the profits from the domestic business with a view to determining whether or not the tax imposed can be paid out of such profits. R. W. A.

THE CONSTITUTIONALITY OF SEGREGATION ORDINANCES.—A legal writer in an article published just a year ago ventured the prophecy that the subject of the constitutionality of municipal segregation ordinances would be one of live interest in the near future. (See article by Mr. James F. Minor, 18 *Virg. L. Reg.* 561). How well-founded the prediction was, is evidenced by the very recent and very interesting cases of *Town of Ashland* v. *Coleman* (nisi prius case reported in 19 *Virg. L. Reg.* 427), and *State* v. *Gurry,* decided by the Court of Appeals of Maryland. 88 Atl. 546.

The facts of the latter case were in brief these: The city of Baltimore passed a penal ordinance, the object of which was to "preserve peace, prevent conflict and ill-feeling between the white and colored races in Baltimore city, and promote the general welfare of the city by providing, so far as practicable, for the use of separate blocks by white and colored people for residences, churches, and schools." The means for carrying out this purpose were that blocks which at the time of the passage of the ordinance were occupied by colored people exclusively should continue so to be occupied; and that blocks occupied exclusively by white people should so continue to be occupied by them. In the instant case, John Gurry, a colored man, was indicted for violation of the ordinance. The main question on appeal was whether the provisions of this measure conflicted with article 23 of the Maryland Bill of Rights and the first section of the Fourteenth Amendment of the Federal Constitution. *Held,* first, that race segregation—the object sought to be accomplished by this ordinance—was an object which properly admitted of the exercise of the police power; but, secondly, that since the ordinance prohibited a person who owned a dwelling when the ordinance was passed from moving into it simply because he was of a different color from other persons using that block as residences, it wholly ignored vested rights, and was therefore unconstitutional.

While the result of the decision is, perhaps, unexceptionable, the opinion of the court contains certain statements that are confusing if not contradictory. Grouping these, and for the sake of convenience numbering them, we have the following: First,—"the city has the power under its charter to pass ordi-